NO. 48960-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE L. A. GORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective assistance of counsel.

2. There was insufficient evidence to prove beyond a reasonable doubt that appellant was armed with a firearm while possessing cocaine with the intent to deliver.

3. There was insufficient evidence to prove beyond a reasonable doubt that appellant was armed with a firearm while possessing methamphetamine with the intent to deliver.

4. There was insufficient evidence to prove beyond a reasonable doubt that appellant was armed with a firearm while rendering criminal assistance.

5. The prosecutor committed misconduct during closing argument.

6. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required because appellant was denied his constitutional right to effective assistance of counsel where defense counsel's representation was deficient in agreeing to allow the State to search appellant's cell phone and appellant was prejudiced by counsel's

deficient representation where text messages found on the phone led to more serious charges?

2. Is reversal of the firearm enhancements required because the evidence fails to prove beyond a reasonable doubt that there was a nexus between the appellant, the crime, and the weapon where the gun was not easily accessible and readily available for use, either for offensive or defensive purposes?

3. Is reversal required where the prosecutor committed misconduct during closing argument by applying the puzzle analogy to reasonably doubt, consequently comparing the reasonable doubt standard to everyday decision making deemed improper by this Court and the Washington Supreme Court?

4. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs where appellant is presumably still indigent because there has been no evidence provided to this Court, and no findings by the trial court, that his financial condition has improved or is likely to improve?

C. STATEMENT OF THE CASE[1]

1. Procedure

On July 9, 2015, the Pierce County Prosecutor's Office, in the name and by the authority of the State of Washington, charged appellant, Jermaine Laron Abdul Gore, with unlawful possession of a firearm in the first degree; unlawful possession of a controlled substance to-wit: cocaine while armed with a firearm; and unlawful possession of a controlled substance to-wit: methamphetamine while armed with a firearm. CP 1-2. The State filed an amended information on April 4, 2016, charging Gore with unlawful possession of a firearm in the first degree; unlawful possession of a controlled substance with intent to deliver to-wit: cocaine while armed with a firearm; unlawful possession of a controlled substance with intent to deliver to-wit: methamphetamine while armed with a firearm; and rendering criminal assistance in the first degree while armed with a firearm. CP 122-24.

The court held evidentiary hearings on February 25 and 29, 2016, and denied Gore's motion to suppress evidence. 4RP 178-91. The court entered Findings of Fact and Conclusions of Law on March 04, 2016. CP

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[1] The record contains 11 volumes of verbatim report of proceedings: 1RP - 01/27/16; 2RP - 02/02/16; 3RP - 02/25/16; 4RP - 02/29/16, 03/04/16; 5RP - 04/04/16; 6RP - 04/05/16; 7RP - 04/06/16; 8RP - 04/07/16; 9RP - 04/11/06; 10RP - 04/12/16; 11RP - 05/06/16

103-08. On April 12, 2016, following a trial before the Honorable James Orlando, a jury found Gore guilty as charged. 10RP 707-10; CP 284-93.

On May 6, 2016, the court imposed an exceptional sentence pursuant to RCW 9.94A.535(2)(c),[2] sentencing Gore to 308 months in confinement with community custody and ordered $800.00 in mandatory legal financial obligations. 11RP 731-36; CP 388-91, 370-84.

Gore filed a timely notice of appeal on May 6, 2016. CP 385.

2. Facts

a. Controlled Substances and Firearm

While investigating a shooting that occurred on May 1, 2015, police apprehended a suspect, Alexander Kitt, at Pierce County Alliance, a treatment facility in Tacoma on May 5, 2015. 7RP 104-06, 122-24; 8RP 257-58. The police learned that Kitt arrived in a Cadillac and after he was dropped off, the Cadillac was parked nearby. Officers Wales and Thiry were instructed to contact the occupants in the car. 8RP 258.

The officers parked their patrol car and as they walked toward the car on foot, they saw three people in the car. 8RP 265. They appeared to be just waiting, hanging out. 8RP 269, 278. The officers did not see any

[2] The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

furtive movements. 8RP 278, 281, 285-86, 320-23, 324-26. The driver was eventually identified as Jermaine Gore; his sixteen-year-old son, Jermohn Gore,[3] was sitting behind him in the back seat; and 22-year-old Ladell Moton was sitting on the passenger side of the back seat. 8RP 266-68.

Officer Wales approached the car from the passenger side and asked Moton for his name. When Moton provided a false name, Wales got him out of the car and patted him down. Wales found a handgun under his coat and narcotics in his pocket. 8RP 269-74. Thereafter, Wales handcuffed Moton and took him into custody. 8RP 274, 276-77.

Officer Thiry approached the car from the driver's side and asked Gore and Jermohn to identify themselves. 8RP 307-08. Gore provided a valid driver's license and Jermohn verbally identified himself. 8RP 308-09, 330-31. Thiry conducted a records check which revealed that Jermohn was a suspect in a different shooting. He handcuffed Jermohn and took him into custody. 8RP 309-14. While Thiry was questioning Gore, the Violent Crimes Task Force arrived on the scene and then a task force member told Gore to step out of the car. 8RP 308, 331. Thiry did not know why because Gore was fully cooperative, he had no warrants, and Thiry did not see a gun

[3] For clarity, Jermaine Gore will be referred to as Gore and his son will be referred to as Jermohn.

or drugs in the car. Gore was handcuffed, taken into custody, and released after giving a statement at police headquarters. 8RP 331-35, 338.

The lead detective ordered an officer to have the Cadillac impounded while he obtained a warrant to search the car for evidence of the shooting. 7RP 126-28. Police searched the car and found a baggie of crack cocaine between the driver's seat and center console. The center console had a top compartment and a lower compartment. When they searched the lower compartment of the console, they discovered a Crown Royal bag containing crystal methamphetamine lying on top of a loaded gun and mail addressed to Jermaine Gore. 8RP 361-64, 401-08; Ex. 3.

Documents collected from the floorboard of the car indicated that Gore's wife, Monique Jenks Gore, purchased the Cadillac on July 18, 2014. 8RP 417-18. Jenks Gore testified that she is the registered and title owner of the car. 9RP 493. On May 5, 2015, Gore used the car to drive his nephew and son to a probation building in Tacoma. 9RP 516. She explained that she bought a gun at a garage sale the day before and put it in the "private" lower console of her car. 9RP 506-09. She obtained the weapon for protection from her former husband who physically abused her and threatened her with a gun. 9RP 495-96.

b. Text Messages

During a pretrial hearing, defense counsel brought to the court's attention that Gore's cell phone was taken from him on May 5, 2015. Counsel explained that he and the prosecutor "agreed in kind" to have the phone searched for text messages after Gore consented to the search, but Gore has withdrawn his consent. Counsel asked the court to order the search without Gore's consent because the text messages could "exonerate" him. RP 99-101. Counsel informed the court that he prepared a consent to search a "narrow corner of the phone." RP 103. The State proposed a "protective order" which would allow defense counsel to obtain an expert to extract specific text messages from the cell phone. RP 102-03. Counsel provided the written consent to Gore and the court stated that an agreed order can be presented to the court. 3RP 104-06.

On the first day of trial, defense counsel filed a motion in limine to suppress text messages that the State obtained from Gore's cell phone. 5RP 2-7; CP 109-21. The following day, the court heard argument from defense counsel and the State. 6RP 33-50. The court ruled that the text messages are admissible as evidence to prove the elements of the crimes charged. 6RP 50-52. Then defense counsel argued that the State lacked probable cause to seize and search Gore's phone and Gore never gave the State consent to search his phone. 6RP 52-53. The State pointed out that defense

counsel and Gore signed an order which contained an agreement that Tacoma Police shall make a copy of the cell phone data that is subject to examination by the State. 6RP 53-56. The court noted that the order signed by both parties was entered on March 7, 2015. 6RP 56-58; Supp. CP ____ (Court's Order Regarding Defense Access and Handling of Exhibit, 03/07/15). Gore denied agreeing to the order, insisting that defense counsel went over his head and proceeded with the agreement without his consent. 6RP 58. The court ruled that unless it receives evidence to the contrary, the court order stands. 6RP 58-59.

A forensic analysis technician testified that he recovered data off of Gore's cell phone. 8RP 436-37. He retrieved text messages and pictures, placed them on a disk, and provided the disk to the Tacoma Police Department. 8RP 437-38. A detective identified several text messages involving drug transactions. 8RP 222-35. Gore Jenks testified about text messages between her and Gore discussing the shooting and Jermohn wanting to leave the state. 9RP 514-16, 556-60. The court admitted the text messages and pictures as evidence. 9RP 468-76, 581-82; Ex. 21, 35.

c. Closing Argument

For closing argument, the prosecutor offered an "analogy" that may help the jury when they think about proof beyond a reasonable doubt. 10RP 611-12. The prosecutor described riding a ferry and finding tables where

"someone leaves a puzzle behind or there are puzzles sitting on the table that passengers are free to use or free to do to pass the time." 10RP 612. The prosecutor likened putting together the puzzle and becoming "convinced beyond a reasonable doubt as to what the image is" to "pieces of evidence that are intended to be put together in such a way that leaves you convinced beyond a doubt that someone committed a crime." 10RP 612. Throughout closing argument and rebuttal, the prosecutor used the puzzle analogy to argue that the State has proven guilt beyond a reasonable doubt. 10RP 641-42, 687, 695.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE GORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL'S REPRESENTATION WAS DEFICIENT IN ALLOWING THE STATE TO SEARCH GORE'S CELL PHONE AND GORE WAS PREJUDICED BY COUNSEL'S DEFICIENT REPRESENTATION WHERE THE EVIDENCE OBTAINED AS A RESULT OF THE SEARCH LED TO MORE SERIOUS CHARGES.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "The purpose of the requirement of effective

assistance of counsel is to ensure a fair and impartial trial." *Thomas*, 109 Wn.2d at 225.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there "is no conceivable legitimate tactic that explains counsel's performance." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel's conduct can be characterized as "legitimate trial strategy or tactics," it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

At a pretrial hearing on February 25, 2016, defense counsel informed the court that he and Gore "are at a bit of an impasse." 3RP 99. Counsel explained that pursuant to an agreement "in kind" with the prosecutor, the State was going to search Gore's cell phone to retrieve text messages sent on May 5, 2015. He claimed "there were text messages that came in from the three young men who were ultimately arrested associated with other crimes with which my client had nothing to do, saying, hey, can you drive me to Pierce County Alliance for purposes of giving a UA, or messages to that effect." 3RP 100. Defense counsel and Gore had met with the lead detective and Gore signed a consent but Gore subsequently withdrew his consent. 3RP 100. Defense counsel asked the court to order the search without Gore's consent because "the text messages can exonerate him." 3RP 100-01.

In response to an inquiry by the court, the prosecutor affirmed that it was the defense, not the State, that wanted to access the phone to obtain evidence. 3RP 103. He proposed a "protective order" which would allow defense counsel to hire an expert and "the phone can be relinquished to that expert to do an extraction to obtain the text messages." 3RP 102. Defense counsel responded that he has an expert, [G]erry Knight, who "can get this done within 24 hours" and has "done this probably with 50 telephones for me in the last five years." 3RP 104. Following a discussion with Gore

before the court, defense counsel declared that he would present an order that afternoon because "I have to do what I think is best for Mr. Gore, even if he thinks it isn't. This is just bizarre to me." 3RP 105.

On April 5, 2016, the second day of trial, the court heard argument on defense counsel's motion to suppress evidence that the State obtained from Gore's cell phone. 6RP 32-33. The State offered as evidence pictures and text messages related to "drug trafficking" and rendering criminal assistance. 6RP 33-35. The court reviewed and discussed the text messages with the prosecutor and defense counsel. 6RP 35-42. Defense counsel argued that the text messages should be excluded as propensity evidence under ER 404(b). 6RP 42-50. The court ruled that the text messages are admissible as evidence to prove the elements of the crimes charged. 6RP 50-51.

Thereafter, defense counsel argued that the defense signed an order only authorizing his expert to retrieve text messages sent on May 5, 2015. "The state said that they wanted to preserve evidence on the phone prior to my expert witness receiving it, but we have never done anything other than authorize dumps on May 5 in the midmorning hours." 6RP 53. The prosecutor then provided the court with an order entered by another judge on March 7, 2016, signed by the prosecutor, defense counsel, and Gore.

The order included rulings that the Pierce County Property Room would release the cell phone to Gerry Knight and prior to its release, the State through the Tacoma Police Department would make a digital copy of the data on the phone "that is subject to examination by the State." 6RP 53-56; Supp. CP ____ (Court's Order Regarding Defense Access and Handling of Exhibit, 03/07/16).

The court noted that the order did not impose any limitations to a specific date and it was signed by "everybody, including Mr. Gore." 6RP 56-57. When Gore denied signing the order, defense counsel unsuccessfully attempted to call up the order on LINX so the prosecutor showed it to him. Gore repeated that he would have never signed such an order, and defense counsel reiterated that Gore "has been emphatic the entire time" that he only consented to recovery of the text messages sent on May 5, 2015." 6RP 57. Gore told the court that he objected to signing the order but defense counsel "went over my head and said that he wanted to do it. I said I didn't want to do it." 6RP 58

As a result of the order, the State was allowed to present as evidence text messages involving drug transactions and providing transportation for Jermohn who wanted to leave the state. Ex. 21, 35. The State highlighted the text messages on Power Point during closing arguments. CP 171-91, 311-69. On the other hand, defense counsel did not present as defense

evidence any text messages exchanged on May 5, 2015, nor did he call Gerry Knight as an expert. Contrary to defense counsel's claim that the text messages would exonerate Gore, the text messages led to his convictions.

The record substantiates that defense counsel's representation was deficient in agreeing to, and signing, the order, which allowed the State to search all the data on the cell phone. Although the order also contains Gore's signature, it is evident that he relied on defense counsel regarding the substance of the order. As the prosecutor argued, "ultimately what we signed was this order entered on March 7, 2016, and that's what the defendant and [defense counsel] are stuck with." 6RP 56. Defense counsel's representation clearly fell below an objective standard of reasonableness because his conduct cannot be considered strategic or tactical where there is no conceivable reason to allow an unfettered search of Gore's cell phone.

The record further substantiates that Gore was prejudiced by defense counsel's representation because the State brought more charges as a result of the text messages it discovered on Gore's cell phone. As the prosecutor argued during closing argument, "Now, let's talk about the evidence. Let's start with the defendant's cell phone, because it's a treasure trove of information." 10RP 613. The State initially charged Gore with unlawful possession of a firearm in the first degree and two counts of possession of a

controlled substance while armed with a firearm. CP 1-2. The State subsequently amended the unlawful possession charges to unlawful possession of a controlled substance with intent to deliver while armed with a firearm and added a charge of rendering criminal assistance in the first degree while armed with a firearm. CP 122-24. Without the text messages and pictures, the State had no evidence to justify the amended charges. As a consequence of defense counsel's deficient representation, Gore was convicted of more serious charges. But for defense counsel's deficient representation, the results of the proceedings absolutely would have been different.

Reversal is required because Gore was denied his constitutional right to effective assistance of counsel where defense counsel's representation was deficient and Gore was prejudiced by defense counsel's deficient performance.

2. THE FIREARM ENHANCEMENTS MUST BE REVERSED BECAUSE THE EVIDENCE FAILS TO PROVE BEYOND A REASONABLE DOUBT THAT GORE WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE CRIMES.

"The right of the individual citizen to bear arms in defense of himself , or the state, shall not be impaired. . . ." CONST. art. I, section 24. This right is enshrined in both the Washington Constitution and the Second Amendment of the United States Constitution. The "Hard Time for Armed

Crime Act of 1995" (Initiative 159), Laws of 1995, ch. 129, section 21, and other laws provide for mandatory enhanced prison sentences for crimes committed with weapons. To harmonize the mandatory sentence enhancements with the constitutional right to bear arms, the Washington Supreme Court concluded that there must be a nexus between the weapon, the crime, and the defendant in constructive possession cases. *State v. Schelin*, 147 Wn. 2d 562, 575-76, 55 P. 3d 632 (2002). "The requirement of a nexus to connect a defendant to a deadly weapon, and the weapon to the crime, guards against a deadly weapon enhancement being found whenever constructive possession is established. With no such temporal nexus requirement, the exercise of the constitutional right to bear arms could be negatively impacted." *Id.*

A person is armed with a weapon if the weapon "is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Gurske*, 155 Wn. 2d 134, 137-38, 118 P.3d 333 (2005)(quoting *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002)(quoting *State v. Valdobinos*, 122 Wn. 2d 270, 282, 858 P.2d 199 (1993)). Mere proximity or mere constructive possession is insufficient to establish that a defendant was armed at the time the crime was committed. *Gurske*, 155 Wn. 2d at 138. "One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open,

in a locked or unlocked container, in a closet on a shelf, or in a drawer)." *Schelin*, 147 Wn.2d at 570.

State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000) and *State v. Sabala*, 44 Wn. App. 444, 732 P.2d. 5 (1986) are instructive. In *Johnson*, the defendant was convicted of controlled substance violations while armed with a deadly weapon. The police had arrested Johnson in the living room of his home and found a gun in an enclosed cabinet compartment underneath a coffee table. At the time, Johnson was handcuffed and seated between the living room and the dining room, with the gun five to six feet away from where he was sitting. 94 Wn. App. at 886-888. On appeal, the Court reversed the deadly weapon enhancements, holding that there was no realistic possibility that Johnson could access his gun. The Court concluded that because Johnson was handcuffed and the gun was well outside his reach, the gun was not easily accessible and the required nexus between the crime and weapon was absent. 94 Wn. App at 894-97.

In contrast, in *Sabala*, the defendant was driving his car, attempting to deliver heroin. The police stopped his car and when he was searched, they found the heroin in his sock. He consented to the search of his car where the police found a gun under the driver's seat. The trial court found Sabala guilty of possession of heroin with intent to deliver while armed with

a deadly weapon. 44 Wn. App. at 445-46. In affirming the trial court on appeal, the Court observed that Sabala was the driver of the car, the gun was located beneath the driver's seat with the grip easily accessible to anyone sitting above it, and it was easily visible to anyone leaning into the car. Accordingly, the Court concluded that Sabala was armed because the gun was easily accessible and readily available for use for either offensive or defensive purposes. 44 Wn. App. at 448.

Here, Gore was parked and sitting in the driver's seat of a car. His son and another young male were sitting in the back seat. 8RP 265-68. The two officers who approached the car on foot did not see any furtive movements. 8RP 278, 281, 285-86, 320-23, 324-26. Officer Thiry testified that when he asked Gore for identification, he provided a valid driver's license. 8RP 307-08. While he was questioning Gore, the Violent Crimes Task Force arrived and then Special Agent Bakken asked Gore to step out of the car. 8RP 308, 314. Thiry took Gore to the front of his patrol car and Gore stood there leaning against the push bars. 8RP 314-15.

Thiry did not know why Gore was told to get out of the car because Gore had no warrants and Thiry did not see Gore do anything wrong:

> Q. At any time, did you see my client touch either guns or drugs at the scene?
> A. No.
> Q. Did my client ever verbally acknowledge the presence of guns or drugs in the car?

A. No.
Q. Was he ever asked, to your knowledge, and you did talk to him, was he ever asked if he was aware that there were guns or drugs in the car?
A. No.
Q. Would you deem him to have been fully compliant?
A. Yes.

8RP 330-35.

Gore was handcuffed, taken into custody, and released after giving a statement at police headquarters. 8RP 332-33, 338. After the police impounded and searched the car, they found a baggie of crack cocaine between the driver's seat and center console. The center console had a top compartment and a lower compartment. When they searched the lower compartment, they discovered a Crown Royal bag containing crystal methamphetamine lying on top of a gun and mail addressed to Jermaine Gore. 8RP 401-08.

Like in *Johnson*, where the police found the gun in an enclosed cabinet compartment of a coffee table, the police found the gun in an enclosed lower compartment of the center console. Gore was removed from the car and taken to a patrol car where he was handcuffed. There was no realistic possibility that he could access the gun. Unlike *Sabala,* where the gun was visibly right under the driver's seat and intentionally positioned to provide easy access, the gun was in the lower compartment, not the top

compartment, of the console, where it was not visible or easily accessible and readily available for Gore's immediate use.

As the *Johnson* Court reasoned, when the only people endangered by the defendant's weapon possession are officers, the deadly weapon enhancement should only be applied where it furthers its intended purpose of ensuring officer safety. 194 Wn. App. at 896. There was no threat to officer safety because like in *Johnson*, Gore "was handcuffed and the gun was well outside his reach." 194 Wn. App. at 896-97. Reversal of the firearm enhancements is required because the evidence fails to prove beyond a reasonable doubt that Gore was armed with a firearm during the commission of the crimes.

3. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT BY IMPROPERLY APPLYING THE PUZZLE ANALOGY TO REASONABLE DOUBT.

A prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).[4] A prosecutor does not fulfill this role "by securing a conviction based on proceedings that violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire

[4] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." RPC 3.8, Comment [1].

criminal justice system." *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendment and article I, section 22 of the Washington Constitution. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive the defendant of his constitutional right to a fair trial. *Id.* at 703-04 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecutor's statements as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010). If the statements were improper, and an objection was lodged, the defense must show that there was a substantial likelihood that the statements affected the jury. *Id.* Absent an objection and request for a curative instruction, the defense waives the issue of misconduct unless the statement was so flagrant and ill intentioned that an instruction could not have cured the prejudice. *Id.* Deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. *In re Glasmann*, 175 Wn.2d at 710-11.

An "analogy" is the "similitude of relations which exist between things compared" and "analogous" means "bearing some resemblance or

likeness that permits one to draw an analogy." *Black's Law Dictionary*, 6th Ed., p. 84.

During closing argument, the prosecutor offered the jury an "analogy" that may be helpful when they think about proof beyond a reasonable doubt:

> Think about a trial much the same way that you think about a puzzle. People have been on the ferry, and they have found tables where someone leaves a puzzle behind or there are puzzles sitting on the table that passengers are free to use or free to do to pass the time. And oftentimes those puzzles don't come with a box, so you don't know what it is the image is that you're putting together. When you put together a puzzle, you may find yourself with pieces you don't know what to do with, right? You put it in every conceivable spot, it just doesn't seem to fit and so you put it aside. At some point, when you're putting together the puzzle, if you have enough time, you become convinced beyond a reasonable doubt as to what the image is that you're seeing. . . . Now, think about a trial much the same way, because a trial is about pieces of evidence that are intended to be put together in such a way that leaves you convinced beyond a reasonable doubt that someone committed a crime. . . .

10RP 611-13.

Throughout closing argument and rebuttal, the prosecutor used the puzzle analogy to argue that the State has proven guilt beyond a reasonable doubt. 10RP 641-42, 687, 695.

In *State v. Lindsay*, the Washington Supreme Court concluded, "When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." 180 Wn.2d 423, 436, 326 P.3d 125

(2014)(citing *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). The Court held that using everyday experiences as an analogy to explain reasonable doubt trivializes the State's burden of proof and is improper. *Id.*

The prosecutor used the everyday experience of riding on a ferry and shaping a puzzle to explain reasonable doubt. This different version of the puzzle "analogy" is improper because there is nothing similar about figuring out a puzzle while leisurely taking a ferry ride and deciding in a trial whether the State has met its burden of proving guilt beyond a reasonable doubt. By comparing putting together a puzzle on a ferry to deliberating in a jury room to determine guilt or innocence, the prosecutor improperly minimized and trivialized the gravity of the standard of proof and the role of the jury. The reasonable doubt standard must not be diluted because it is "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Regardless of the fact that defense counsel failed to object, reversal is required where this Court and the Supreme Court concluded that comparing the reasonable doubt standard to everyday decision making is

improper and a prosecutor is presumed to know the law. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), *review denied*, 131 Wn. 2d 1018, 936 P.2d 417 (1997)(we note that this improper argument was made over two years ago and therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial). As the Supreme Court held in *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007), WPIC 4.01[5] adequately instructs the jury on reasonable doubt and permits both the government and the accused to argue their theories of the case. In light of the continued use of improper variations of the puzzle analogy, this Court should abolish the puzzle analogy completely because it is unnecessary, distracts the jury, and does not further the ends of justice.

4. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE GORE REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

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[5] A reasonable doubt is one for which a reason exits and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. CP 250 (Instruction No. 2).

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court

emphasized that the authority "is permissive" as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Gore is indigent. The trial court found that he is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 386-87. This Court should therefore presume that Gore remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to

determine indigency. "Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court, that Gore's financial condition has improved or is likely to improve. Gore is presumably still indigent and this Court should exercise its discretion to not award costs.

E. CONCLUSION

For the reasons stated, this Court should reverse Mr. Gore's convictions.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Mr. Gore remains indigent.

DATED this 29th day of November, 2016.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Jermaine L. A. Gore

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us and by U.S. Mail to Jermaine L. A. Gore, DOC # 722764, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of November, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

November 29, 2016 - 3:41 PM

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